

MANDATE

N.Y.S.D. Case #
12-cv-3878(GBD)

14-3245

Wayne County Employees' Retirement System v. Dimon et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Thurgood Marshall United
States Courthouse, 40 Foley Square, in the City of New York,
on the 16th day of October, two thousand fifteen.

PRESENT: DENNIS JACOBS,
RAYMOND J. LOHIER, JR.,
Circuit Judges.
GEOFFREY W. CRAWFORD,*
District Judge.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 11/17/2015

-----X
WAYNE COUNTY EMPLOYEES' RETIREMENT
SYSTEM,

Plaintiff-Appellant,

-v.-

14-3245

JAMES S. DIMON et al.,
Defendants-Appellees.

-----X

* The Honorable Geoffrey W. Crawford, United States
District Judge for the District of Vermont, sitting by
designation.

1 **FOR APPELLANT:** JOSEPH D. DALEY, ROBBINS GELLER
2 RUDMAN & DOWD LLP, San Diego,
3 California.
4

5 **FOR APPELLEES:** DARYL A. LIBOW (with Richard C.
6 Pepperman, II & Christopher
7 Michael Viapiano on the brief)
8 SULLIVAN & CROMWELL LLP,
9 Washington, DC.
10

11 Appeal from a judgment of the United States District
12 Court for the Southern District of New York (Daniels, J.).
13

14 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
15 **AND DECREED** that the judgment of the district court be
16 **AFFIRMED.**
17

18 Wayne County Employees' Retirement System ("Wayne
19 County") appeals from the judgment of the United States
20 District Court for the Southern District of New York
21 (Daniels, J.), dismissing its complaint pursuant to Rule
22 23.1 of the Federal Rules of Civil Procedure. We assume the
23 parties' familiarity with the underlying facts, the
24 procedural history, and the issues presented for review.
25

26 Although Rule 23.1 is a "rule of pleading that creates
27 a federal standard as to the specificity of facts alleged,"
28 the "adequacy of those efforts is to be determined by state
29 law." RCM Sec. Fund, Inc. v. Stanton, 928 F.2d 1318, 1330
30 (2d Cir. 1991). Since JPMorgan Chase ("JPMorgan") is a
31 Delaware corporation, this appeal is governed by Delaware
32 law.
33

34 Wayne County contends that it has properly pled demand
35 futility because a majority of JPMorgan's Board of Directors
36 ("Board") consciously disregarded pertinent indicators of
37 business risk and thereby failed to properly exercise their
38 oversight duties. These allegations plead Board inaction
39 and are therefore analyzed under Rales v. Blasband, 634 A.2d
40 927, 933-34 (Del. 1993). Wayne County's complaint directly
41 implicates the theory of liability articulated in In re
42 Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968
43 (Del. Ch. 1996). See Stone ex rel. AmSouth Bancorporation
44 v. Ritter, 911 A.2d 362, 370 (Del. 2006) ("We hold that
45 Caremark articulates the necessary conditions predicate for
46 director oversight liability: (a) the directors utterly
47 failed to implement any reporting or information system or

controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."). Accordingly, "[w]here directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith." *Id.*; see also *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 123 (Del. Ch. 2009) ("Thus, to establish oversight liability a plaintiff must show that the directors *knew* they were not discharging their fiduciary obligations or that the directors demonstrated a *conscious* disregard for their responsibilities such as by failing to act in the face of a known duty to act. The test is rooted in concepts of bad faith; indeed, a showing of bad faith is a *necessary condition* to director oversight liability.").¹

The standards governing the pleading of *Caremark* claims are exacting. See *Caremark*, 698 A.2d at 971 ("[O]nly a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability."). And that considerable threshold is raised when, as here, the claims involve a failure to monitor *business* risk, as opposed to legal risk. See *Citigroup*, 964 A.2d at 131 ("While it may be tempting to say that directors have the same duties to monitor and oversee business risk, imposing *Caremark*-type duties on directors to monitor business risk is fundamentally different."). Thus, "[a]ssuming excessive risk-taking at some level becomes the misconduct contemplated by *Caremark*, the plaintiff would essentially have to show that the board . . . *consciously* disregarded red flags signaling that the company's employees were taking facially improper, and not just ex-post ill-advised or even bone-headed, business risks. Such bad-faith indifference would be formidably difficult to prove." *In re Goldman Sachs Grp., Inc. S'holder Litig.*, No. 5215-VCG, 2011 WL 4826104 at *22 n.217 (Del. Ch. Oct. 12, 2011). "Even a showing of gross negligence by a majority of the Board will

¹ The exculpation clause in the JPMorgan Charter is irrelevant here because it does not immunize actions taken in bad faith, which is a prerequisite for director oversight liability.

1 not suffice." In re SAIC Inc. Derivative Litig., 948 F.
2 Supp. 2d 366, 381 (S.D.N.Y. 2013), aff'd Welch v.
3 Havenstein, 553 F. App'x 54 (2d Cir. 2014). In short, a
4 Caremark claim is "possibly the most difficult theory in
5 corporation law upon which a plaintiff might hope to win a
6 judgment." Caremark, 698 A.2d at 967.

7
8 Wayne County's pleading does not satisfy the
9 requirements for alleging a Caremark claim predicated on
10 failed oversight of business risk. The complaint cites
11 instances in which warning signs of excessive risk reached
12 members of the Board, and identifies members of the Board
13 who received particular warnings. But Wayne County cannot
14 sustain its burden by relying on red flags that reached a
15 single Board member or a minority of the Board: "Delaware
16 law does not permit the wholesale imputation of one
17 director's knowledge to every other for demand excusal
18 purposes." Desimone v. Barrows, 924 A.2d 908, 943 (Del. Ch.
19 2007).

20
21 The complaint does allege that some warnings reached
22 the majority of the Board; but the most urgent signs were
23 given in a single quarter in which an audit report was
24 prepared and delivered, and the severe loss followed the
25 audit report by a few days or a couple weeks. Thus, even if
26 there were red flags warning of facially improper business
27 risk, the warning signs were not received, let alone
28 ignored, over a sustained period of time. Wayne County has
29 not pled a "sustained or systematic failure of the [B]oard
30 to exercise oversight." Caremark, 698 A.2d at 971.

31
32 Nor may we substantively evaluate the magnitude of
33 business risk JPMorgan was facing with the benefit of
34 hindsight. See Goldman Sachs, 2011 WL 4826104 at *22 ("If
35 an actionable duty to monitor business risk exists, it
36 cannot encompass any substantive evaluation by a court of a
37 board's determination of the appropriate amount of risk.
38 Such decisions plainly involve business judgment.").

39
40 Finally, Wayne County's argument that the district
41 court erred in denying it leave to amend its complaint must
42 also be rejected given that the length and fulness of this
43 complaint does not appear to have been abbreviated, or
44 foreshortened.

1 For the foregoing reasons, and finding no merit in
2 Wayne County's other arguments, we hereby **AFFIRM** the
3 judgment of the district court.
4

5 FOR THE COURT:
6 CATHERINE O'HAGAN WOLFE, CLERK
7


The signature of Catherine O'Hagan Wolfe is written in cursive. A circular official seal of the United States Court of Appeals, Second Circuit, is stamped over the signature. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


The signature of Catherine O'Hagan Wolfe is written in cursive. A circular official seal of the United States Court of Appeals, Second Circuit, is stamped over the signature. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".